

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

|  |   |              |
|--|---|--------------|
| PAUL H. KREIDER, III, and                    | : |              |
| DEBORAH H. KREIDER, TIM A.                   | : |              |
| EISENHAUER and MELODY A.                     | : |              |
| EISENHAUER, SCOT A. FERTICH and              | : |              |
| NANCE J. FERTICH, individually and as        | : |              |
| representatives for other similarly situated | : |              |
| individuals,                                 | : |              |
| Plaintiffs                                   | : |              |
|  | : | CIVIL ACTION |
| v.   | : |              |
|  | : | NO. 99-1896  |
| COUNTY OF LANCASTER, on its own              | : |              |
| behalf and as representative for other       | : |              |
| similarly situated political subdivisions,   | : |              |
| and THOMAS WALKER, in his capacity           | : |              |
| as Register of Wills and as representative   | : |              |
| for other similarly situated officers, and   | : |              |
| BENJAMIN HESS, JR., in his capacity as       | : |              |
| Controller and as representative for other   | : |              |
| similarly situated officers,                 | : |              |
| Defendants                                   | : |              |

**MEMORANDUM AND ORDER**

YOHN, J. March , 2000

Three married couples who have adopted children in Lancaster County, Pennsylvania, have brought this suit to challenge the validity of Pennsylvania’s adoption counseling filing fee [“fee” or “counseling fee”], which is paid into a segregated fund of the appropriate county [“fund” or “counseling fee fund”] by the adopting parents. *See* 23 Pa. Cons. Stat. § 2505(e). The plaintiffs claim that the fee violates the Takings and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *See* Pls.’ First Am. Compl. (Doc. No. 2) [“Am. Compl.”] ¶¶ 69-73. The plaintiffs also claim that the fee violates the Pennsylvania

Constitution. *See id.* ¶¶ 74-78. The plaintiffs ask that collection of the fee be stopped and that fees already paid be returned with interest.

The named defendants include the following: Lancaster County; Thomas Walker, the Register of Wills allegedly responsible for the collection of the fee in Lancaster County; and Benjamin Hess, the County Controller allegedly responsible for depositing and administering the fee in Lancaster County. *See Am. Compl.* ¶¶ 6-11. Pending before the court is the plaintiffs' motion for class certification (Doc. No. 8) ["Pls.' Mot."]. The plaintiffs seek certification of a plaintiffs' class "consisting of all adopting parents who have paid Pennsylvania's adoption counseling fund fee." Pls.' Mot. ¶ 1. The plaintiffs also seek certification of three defendants' classes: one consisting of the sixty-seven Pennsylvania counties, one consisting of the Pennsylvania county officials responsible for collecting the fee, and one consisting of the Pennsylvania county officials responsible for depositing and administering the fee. *See Pls.' Mot.* ¶¶ 15-17. Because the plaintiffs have not demonstrated that the proposed classes meet the requirements of Federal Rule of Civil Procedure 23(a), I will deny the plaintiffs' motion.

## **I. Background**

In 1992, the Pennsylvania Adoption Act was amended to provide that "each report of intention to adopt . . . shall be accompanied by a filing fee in the amount of \$75 which shall be paid into a segregated fund established by the county." 23 Pa. Cons. Stat. § 2505(e). According to the statute, if a biological parent is in need of counseling concerning the relinquishment of his or her parental rights and is unable to afford such counseling, the costs of the counseling will be paid from this fund. *See* 23 Pa. Cons. Stat. § 2505 (d)-(e). The court may reduce or waive the

fee in certain circumstances, such as in the case of a prospective adoptive parent who is able to demonstrate financial hardship. *See* 23 Pa. Cons. Stat. § 2505(e).

The named plaintiffs have adopted children in Lancaster County and have paid the fee. *See* Am. Compl. ¶¶ 44-51. They claim that Lancaster County has collected over \$37,500<sup>1</sup> in fees since 1992 but that no money has been distributed from the county's fund for counseling (or for any other purpose). *See id.* ¶ 29-31. The plaintiffs also state their belief that each of the sixty-seven counties in Pennsylvania has collected an average of over \$25,000 in fees since 1992 but has disbursed an average of less than \$1,000 from the county's fund. *See id.* ¶¶ 39-40.

## **II. Legal Standard**

In deciding a motion for certification of a class action, the court does not examine the merits of plaintiffs' underlying claims. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). Rather, the court focuses on the requirements of Rule 23 of the Federal Rules of Civil Procedure. In order to obtain class certification, those seeking certification must demonstrate that all four prerequisites of Rule 23(a), and at least one part of Rule 23(b), have been satisfied. *See id.* at 162-63; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 308-09 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 890 (1999); *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994). Moreover, a court may only certify a class "after a rigorous analysis." *General Tele. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

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<sup>1</sup>In their amended complaint, the plaintiffs allege the collection of over \$75,000, but in their memorandum in support of their motion, they claim only the collection of over \$37,500 in fees. *See* Pls.' Mem. in Supp. of Mot. for Class Action Determination (Doc. No. 8) ["Pls.' Mem." ] at 4.

### **III. Discussion**

#### **A. The Plaintiffs' Class**

Before a class may be certified, Federal Rule of Civil Procedure 23(a) mandates a showing of numerosity, commonality, typicality, and adequacy of representation. Specifically, the rule provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Although these four prerequisites overlap, the Third Circuit has noted that there is a conceptual distinction between the first two prerequisites—numerosity and commonality—which evaluate the sufficiency of the class itself, and the last two prerequisites—typicality and adequacy of representation—which evaluate the sufficiency of the named class representatives. *See Hassine v. Jeffes*, 846 F.2d 169, 176 n.4 (3d Cir. 1988). The court will consider each of these prerequisites in turn.

#### **1. Numerosity**

Rule 23(a)(1) requires a potential class to be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Although Rule 23(a)(1) is often characterized as imposing a numerosity requirement, it “is not a numerosity requirement in isolation.” 1 Newberg on Class Actions § 3.03, at 3-10 (3d ed. 1992) [“Newberg”]. This rule imposes an “impracticability of joinder requirement, of which class size is an inherent consideration within

the rationale of joinder concepts.” *Id.* at 3-11. A court must evaluate the practicability of joinder in the context of the particular litigation. *See Gurmankin v. Costanzo*, 626 F.2d 1132, 1135 (3d Cir. 1980). When class size is large, numbers alone are generally dispositive. *See* 1 Newberg § 3.03, at 3-17. For example, “the numerosity requirement is [generally] satisfied where the class exceeds 100 members.” *Kromnick v. State Farm Ins. Co.*, 112 F.R.D. 124, 126 (E.D. Pa. 1986).

The plaintiffs have demonstrated that over 500 adoptions have occurred in Lancaster County since 1992. *See* Pls.’ Mem. at 4; Aff. of Cynthia A. Otto (Doc. No. 8) [“Otto Aff.”] ¶¶ 3-4. Absent special circumstances, *see, e.g.*, Am. Compl. ¶¶ 49-50; Pls.’ Mem. at 3, each of these over 500 adoptions necessitated the payment of the fee. Thus, the number of adopting parents who paid the fee in Lancaster County alone is significantly larger than 100.

The plaintiffs seek to certify a plaintiffs’ class of “all adopting parents who have paid Pennsylvania’s adoption counseling fund fee.” Pls.’ Mot. ¶ 1. Considering the number of potential plaintiffs and the small size of each potential plaintiff’s prospective recovery, I find that it would be impracticable to join the class of adopting parents who have paid the fee in Lancaster County. The expansion of this class to include the qualifying adopting parents in the entire state would only make joinder of all the plaintiffs even more impracticable. Therefore, the court finds that the proposed plaintiffs’ class satisfies Rule 23(a)(1)’s numerosity requirement.

## **2. Commonality**

For a class to be certified, Rule 23(a)(2) requires the existence of “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). This commonality requirement will be satisfied “if the named plaintiffs share at least one question of fact or law with the grievances of the

prospective class.” *Baby Neal*, 43 F.3d at 56. Common questions are those which arise from a “common nucleus of operative facts.” *Kromnick*, 112 F.R.D. at 128 (internal quotation marks omitted). Because Rule 23(a)(2) requires only a single issue common to all members of the class, the requirement is easily met. *See* 1 Newberg § 3.10, at 3-50.

The plaintiffs base their argument about the fee’s unconstitutionality on the amount of the fee being “grossly disproportionate to the cost it is intended to defray.” Am. Compl. ¶¶ 72, 77. They do not claim that the collection of the fee is per se unconstitutional but that the disparity between the fees collected and the money disbursed from the funds renders the collection of the fee unconstitutional. If, however, the plaintiffs cannot demonstrate the existence of a disparity, then their argument breaks down.

The court finds that the plaintiffs have shown a disparity in the fees collected by Lancaster County and the money paid out from its fund. *See* Am. Compl. ¶¶ 29-31. Thus, a common question of law exists for people who adopted children in Lancaster County and paid the fee. That common question is whether or not the disparity between the fees collected and the money disbursed is so great as to be unconstitutional.

As the defendants point out, the plaintiffs have not, however, shown that a similar disparity exists in Pennsylvania’s sixty-six other counties. *See* Defs.’ Resp. to Pls.’ Mot. for Class Action Determination (Doc No. 19) [“Defs.’ Resp.”] at 8-10. Demonstrating this disparity is important because “two plaintiff class members from two different counties with radically different Fee collections and expenditures” would present very different questions of law. Defs.’ Resp. at 9. The only information before the court—either in the amended complaint or in an affidavit—about possible disparities in other counties are the plaintiffs’ vague statements

concerning their “belief” about the average fees collected and their “estimation” about the money disbursed in the other sixty-six counties in Pennsylvania. *See* Am. Compl. ¶¶ 39-40. These vague statements, without any supporting documents or any explanation as to their basis, do not set forth sufficient facts to allow the court to conduct the required “rigorous analysis” as to whether or not a common question of law exists for “all adopting parents who have paid Pennsylvania’s adoption counseling fund fee.” Pls.’ Mot. ¶ 1. For this reason, the court cannot find that the proposed plaintiffs’ class satisfies the commonality requirement.

### **3. Typicality**

Rule 23(a)(3) mandates a determination of whether or not the “claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The typicality inquiry required by Rule 23(a)(3) “is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees’ interests will be fairly represented.” *Baby Neal*, 43 F.3d at 57. This inquiry focuses on “whether the named plaintiff’s individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of the class members will perform be based.” *Id.* at 57-58 (internal quotation marks omitted). The court must, in effect, discern whether potential conflicts exist within the proposed class. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996). Typicality will be found to exist when the named plaintiffs and the proposed class members “challenge[] the same unlawful conduct.” *Baby Neal*, 43 F.3d at 58.

The plaintiffs have demonstrated that they share a common question of law with adopting parents who paid the fee in Lancaster County. *See supra* Part III.A.2. Thus, the named plaintiffs and the Lancaster County adopting parents would use the same legal theories to challenge the same conduct. Considering the absence of any indication to the contrary, the court is convinced that the interests of the named plaintiffs are aligned with those of the Lancaster County adopting parents.

Due to the absence of information before the court, it is unclear, however, that the challenged conduct has occurred outside Lancaster County. As the defendants argue, “the named plaintiffs’ claim that the Fee is unconstitutional as applied to them because Lancaster County spends none of the Fee on counseling would obviously not be ‘typical’ of a claim relating to a county in which some or all of the Fee was spent on counseling.” Defs.’ Resp. at 9. The plaintiffs have not shown that a significant disparity exists in counties other than Lancaster County. *See supra* Part III.A.2. As a result, the court cannot make the required “rigorous analysis” of the typicality, or the lack thereof, of the named plaintiffs’ claims. Therefore, the court cannot find that the named plaintiffs satisfy the typicality requirement with respect to the proposed class.

#### **4. Adequacy of Representation**

Before certifying a class, a court must find that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The adequacy of representation inquiry has two components designed to ensure that the absentee plaintiffs’ interests are fully pursued. In order satisfy the first component, “the interests of the named

plaintiffs must be sufficiently aligned with those of the absentees.” *Georgine*, 83 F.3d at 630. In order to satisfy the second component, “class counsel must be qualified and must serve the interests of the entire class.” *Id.* The burden is on the defendants to show the inadequacy of representation of a plaintiffs’ class. *See Lewis v. Curtis*, 671 F.2d 779, 788 (3d Cir. 1982).

The court has already recognized the uncertainty as to the similarity of the named plaintiffs’ interests and the interests of the absentee members of the proposed plaintiffs’ class. *See supra* Part III.A.3. This uncertainty precludes satisfaction of the first component of the adequacy of representation inquiry. This uncertainty also prevents the court from being able to make a reasoned judgment as to whether or not the plaintiffs’ attorneys could represent the potentially conflicting interests of all members of the proposed plaintiffs’ class.

#### **B. The Defendants’ Classes**

As discussed above, it is unclear whether disparities between the fees collected and the money disbursed exist in counties other than Lancaster County. For this reason, it is also unclear whether any non-Lancaster County defendants should be named in this lawsuit. Consequently, the court cannot certify any of the three proposed defendants’ classes.

#### **IV. Conclusion**

Although the plaintiffs demonstrate that certification would be appropriate for a plaintiffs’ class that included all adoptive parents who paid the fee in Lancaster County, the plaintiffs have not demonstrated that certification would be appropriate for all adoptive parents who paid the fee in Pennsylvania. Consequently, the court can certify neither the proposed

plaintiffs' class nor the proposed defendants' classes. Therefore, the court will deny the plaintiffs' motion for certification of the proposed plaintiffs' class and the proposed defendants' classes. An appropriate order follows.

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| Defendants                                   | : |              |

**ORDER**

YOHN, J.

AND NOW, this     day of March, 2000, upon consideration of the plaintiffs' motion for class certification (Doc. No. 8), the defendants response thereto (Doc. No. 19), and the plaintiffs' reply to the defendants' response (Doc. No. 24), IT IS HEREBY ORDERED that the plaintiffs' motion is DENIED.

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William H. Yohn, Jr.